ADVISORY OPINIONS OF THE JUDGES OF ENGLAND.

THE recent assemblage of the English judges to advise the House of Lords in the determination of the case of Allen *v.* Flood recalls a practice which in recent times has been seldom employed. It is an ancient right of the House of Lords to summon the judges at the beginning of each Parliament to be present for the purpose of assisting the House, when required, in the solution of legal questions. Although the judges continue to receive such a summons they no longer attend, save at the opening of Parliament, unless specially summoned for a particular purpose.[1] English judges alone are summoned. It does not appear that the Irish judges have ever been consulted; but in 1737 three of the judges of the Justiciary Court of Scotland were summoned to advise the House of Lords in the matter of the Porteous riots, and again in 1807 to give an opinion on a Scotch Judicature Bill.[2]

It was a common practice of the House during the eighteenth century to consult the judges, but Brown, the Parliamentary reporter of that period, simply reports their conclusions. During the first quarter of the nineteenth century Eldon and Redesdale, who performed most of the judicial functions of the House, seldom called for the views of the judges. During the period from the Common Law Procedure Act to the Judicature Act the judges were frequently consulted, and almost all the reported opinions of the judges on such occasions come within this period. Since 1876, the judges have been assembled only four times. The establishment of permanent courts of appeal seems to have led to the practical abandonment of the old practice.

In practice the attendance of the judges seems to have been subject to the same difficulties encountered in the make-up of the Court of Exchequer Chamber. Occupied with the labors of their

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[1] Anson, Law & Custom of the Constitution, pt. ii. p. 472; Todd, Parliamentary Government in England, ii. 853, 854.

[2] Law Times, Nov. 27, 1880, p. 58.

own courts the judges were irregular in responding.[1] And there is plenty of evidence in the reports that the right of the House to put questions of law to the judges without regard to the form of an appeal or to the points raised[2] often led the judges to regard the duty with aversion. In McNaghten's case,[3] for instance, although the questions proposed by the House were suggested by the issue raised in McNaghten's trial they were so abstract in form that Justice Maule requested to be excused from giving an answer. At the outset of the opinion which he finally gave, he puts the difficulties of such a method of consideration in a strong light. "I feel great difficulty," he said, "in answering the questions put by your lordships on this occasion: first, because they do not appear to arise out of, and are not put with reference to, a particular case, or for a particular purpose, which might explain or limit the generality of their terms, so that full answers ought to be applicable to every possible state of facts not inconsistent with those assumed in the questions; secondly, because I have heard no argument at your lordship's bar, or elsewhere on the subject of these questions, the want of which I feel the more, the greater are the number and extent of questions which might be raised in argument; and, thirdly, from a fear, of which I cannot divest myself, that as these questions relate to matters of criminal law of great importance and frequent occurrence, the answers to them by the judges may embarrass the administration of justice when they are cited in criminal cases."

The judges are called upon to advise, but the decision rests with the House alone. Lord Campbell expressed the accepted doctrine when he said in Burdett *v.* Spilsbury,[4] "When your lordships con-

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[1] Actual attendance and oral answer has always been required upon a difference of opinion, except in a few cases where a written answer was received by special permission. Stephenson *v.* Higginson, 3 H. L. 652; Egerton *v.* Brownlow, 4 H. L. 1.

Cases in which the judges gave their opinion at the hearing seem to have been rare. Often their delay was vexatious. Two or three years' consideration was not uncommon; in Bertwhistle *v.* Vardell, 2 C. & F. 571, twelve years intervened between the trial and final judgment in the House of Lords.

[2] Bright *v.* Hatton, 3 H. L. 345. In the matter of the Westminster Bank, 2 C. & F. 192, the judges declined to answer, on the ground that the question was "proposed in terms which render it doubtful whether it is a question confined to the strict legal construction of existing acts of Parliament." *In re* Islington Market Bill, 3 C. & F. 512, the judges gave an opinion on a bill pending in Parliament. It will be remembered that the judges were called upon for their opinions on the law of libel when Fox's bill was pending in Parliament.

[3] 10 C. & F. 199.

[4] 10 C. & F. 413.

sult the Queen's judges I do not at all consider that you are bound by the opinion of the majority, or even by their unanimous opinion, unless you are perfectly satisfied with the reasons which they assign for the opinion they give."[1] Individual lords have taken a different view of their duty in this respect.[2] I have been able to find, however, only five instances in recent times in which the House has given judgment contrary to the opinion of a majority of the judges: O'Connell *v.* The Queen,[3] Jeffreys *v.* Boosey,[4] Unwin *v.* Heath,[5] Hammersmith Ry. *v.* Brand,[6] Allen *v.* Flood.[7]

The case of Jeffreys *v.* Bocsey concerned a question of copyright — a question upon which there has been great conflict of authority ever since the case of Millar *v.* Taylor,[8] where, for the first time under Mansfield's chief justiceship, the judges of the Court of King's Bench were divided in opinion. It appeared that Bellini, a foreign musical composer, resident at that time in his own country, assigned to Ricordi, another foreigner, also resident there, according to the laws of their country, his right in a musical composition of which he was the author, and which was then un-

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[1] So, in Mirehouse *v.* Rennell, 1 C. & F. 603, Lyndhurst moved judgment "not on the ground of the majority of the judges being of opinion in favor of that judgment, but because I think it is a sound and correct opinion."

[2] Lord Wynford may be taken as an exponent. In Atty.-Gen. *v.* Winstanley, 5 Bligh (N. S.), 144, he said: "My view of the case had altered before I heard the opinion of the learned judge [Baron Bayley]; but if I had remained in my former opinion I should have done as I did upon one occasion before when I had the misfortune to differ from all the learned judges, I should have advised your lordships to act upon their opinion; for it would introduce a wretched state of uncertainty in the law of the country if you were not to act upon that which is the highest authority of the law in Westminster Hall, but follow the opinions of individual Peers. Wynford acted consistently in accordance with this view. Roake *v.* Denn, 10 D. & C. 446; Giles *v.* Grover, 1 C. & F. 222; Mirehouse *v.* Rennell, 1 C. &. F. 609. See, also, Lord Truro's opinion in Emmens *v.* Elderton, 4 H. L. 675. Roake *v.* Deen, 1 D. & C. 446, is a case where the Lord Chancellor and Lord Wynford, constituting the court, yielded their own judgment to the unanimous opinion of the judges. In speaking of his dissent from the majority of the judges in O'Connell *v.* The Queen, 11 C. & F. 422, Brougham stated that he had also dissented from the majority of the judges in the case of the Irish marriages because his own view was sustained by many eminent authorities. "If it had not been for that," he said, "I should on no account have set up my judgment against that of the learned judges." On the other hand, Lord Chancellor Eldon is reported to have said in rebuking the House for having received the opinion of the judges in the absence of the law lords: "I recollect a case wherein the twelve judges having given their opinions, the Lord Chancellor satisfied the House that they were all wrong." Campbell, Lives of the Chancellors, ix. 353.

[3] 11 Cl. & F. 232.

[4] 4 H. L. 815.

[5] 5 H. L. 513.

[6] 4 E. & I. App. 171.

[7] [1898] A. C. 1.

[8] 4 Burr. 2303.

published. The assignee brought the composition to England, and before publication assigned it, according to the forms required by English law, to an Englishman named Boosey, by whom it was first published in England. In the House of Lords Lord Chancellor Cranworth, whose charge was in question, Brougham, and St. Leonards decided that the foreign assignee, Bellini, had not by the law of England an assignable copyright in the musical composition, adopting the view of Alderson, Parke, Pollock, and Jervis,[1] as opposed to the opinion of Crompton, Williams, Erle, Wightman, Maule, and Coleridge. The opinions of Erle and Brougham constitute an able exposition of the case for and against the existence of copyright under the common law.

Hammersmith Ry. *v.* Brand involved a principle which, in all its ramifications, has commanded much attention in the courts on both sides of the Atlantic; namely, that an action will not lie for damage necessarily resulting from the exercise of the powers of an act of Parliament in a case for which no provision as to compensation or liability is made. Willes, Bramwell, Lush, Keating, and Pigott were of the opinion that there was a right to compensation; Blackburn *contra.* Lords Chelmsford and Colonsay adopted Blackburn's view, Lord Chancellor Cairns dissenting.

In O'Connell's case the main point in dispute was the validity of a general judgment where some of the counts are bad. It was maintained that the practice to this effect did not apply to writs of error, but was confined to motions in arrest of judgment. Seven judges were against the objection; two in its favor. Denman, Cottenham, and Campbell held that the conviction could not stand. Lyndhurst and Brougham dissented.

An examination of the cases, in which the judges have been called upon for advice, shows plainly the haphazard way in which the law has been developed. One would expect to find such elaborate discussion bestowed only upon cases involving fundamental principles of vital importance. But such has not been the case. The House of Lords reports from 1827 to 1899 contain one hundred and twenty-five cases in which the judges have assisted. Of this number there are hardly more than a score which are in any sense landmarks in legal history. Fully one third of the number deal with the construction of particular documents; and of the cases

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[1] See, also, Reade *v.* Conquest, 9 C. B. (N. S.) 755. The case of Wheaton *v.* Peters, 8 Peters, 591, settled the same doctrine in the United States.

involving the construction of statutes not more than half a dozen relate to statutes of general importance. Indeed, aside from the relative unimportance of most of these cases, it is difficult to understand upon what principle the House acted in determining when the judges should be assembled. For in twenty-four cases there was no difference of opinion from the trial court to the House of Lords: and in fifty-eight cases the assembled judges were unanimous in opinion. Of course, in addition to cases of first importance, the procedure was often properly applied in the final settlement of questions which, although relatively unimportant, had been much debated: [1] cases in which, as Lord Brougham said, "it is of much more importance that the question should be settled than it is in which way it shall be settled.[2]

There has been a remarkable consensus of opinion among the law lords. In only eleven cases was there a division of opinion in the House: Birtwhistle *v.* Vardell,[3] Garland *v.* Carlisle,[4] The Queen *v.* Millis,[5] O'Connell *v.* The Queen,[6] Grey *v.* Friar,[7] Jeffries *v.* Alexander,[8] Fitzmaurice *v.* Bayley,[9] Peek *v.* North Staffordshire Ry. Co.,[10] Hammersmith Ry. *v.* Brand,[11] Atty.-Gen. *v.* Dakin,[12] Allen *v.* Flood. [13]

Of these cases probably the most famous is The Queen *v.* Millis, concerning the validity of the Irish marriages. The Irish Court of King's Bench was equally divided as to the validity of a marriage at which no regular clergyman had been present. In the House of Lords Chief Justice Tindal delivered the unanimous opinion of the judges against the validity of the marriage. The lords were equally divided in opinion, Brougham, Denman, and Campbell agreeing with the judges, while Lyndhurst, Cottenham, and Abinger took the contrary view. Owing to the form in which the question came before the House the result of the division was that the marriage was held to be void. By the canon law, which is the basis of the marriage law of Christendom, a contract *per verba de praesenti* or *per verba de futuro subsequente copulâ* was sufficient alone to constitute a valid marriage. But marriage, although based upon the contract of the

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[1] Such as Irving *v.* Manning, 1 H. L. 303, and Garland *v.* Carlisle, 4 C. & F. 692.
[2] 1 C. & F. 223.
[3] 2 C. & F. 511, 7 C. & F. 895.
[4] 4 C. & F. 692.
[5] 10 C. & F. 533.
[6] 11 C. & F. 232.
[7] 4 H. L. 565.
[8] 8 H. L. 594.
[9] 9 H. L. 78.
[10] 10 H. L. 473.
[11] 4 E. & I. App. 182.
[12] 4 E. & I. App. 338.
[13] [1898] A. C. 1.

parties, is rather a status arising out of contract, to which each country is entitled to attach its own conditions.[1] According to the English doctrine the common law required that the marriage should be celebrated in the presence of a priest in holy orders.[2]

Peek *v.* No. Staffordshire Ry. Co. lays down a familiar doctrine. The point involved in that case depended almost entirely upon the construction of the Railway & Canal Traffic Act of 1854, which provided that no general notice given by a railway company is valid for the purpose of limiting the common law liability of the carrier, but that such liability might be limited by special contract on conditions which were just and reasonable, short of exemption from liability occasioned by the neglect of the railway company. It seems that in the negotiations between the shipper and the agent of the railway company on the subject of terms, the latter stated as a condition that the company would not be responsible for damage to goods shipped unless their value was declared and they were insured at a certain rate. After some delay the agent received a note requesting that the goods might be shipped forthwith "not insured." The goods were shipped and suffered damage. In the House of Lords Westbury, Cranworth, and Wensleydale, following the opinion of Blackburn, Crompton, Williams, and Cockburn, as opposed to Willes, Martin, and Pollock, held that the condition was unreasonable; that there was no special contract signed by the parties within the meaning of the statute, and that the rights of the parties were therefore to be determined by the common law. Lord Chelmsford dissented.

The judges of the Exchequer Chamber had been equally divided, in Atty.-Gen. *v.* Dakin, as to whether a sheriff who had levied a *fi. fa.* in some of the apartments of Hampton Court Palace was liable to an information for intrusion. The House decided (by Chelmsford and Colonsay, Hatherley dissenting) that this palace, although a royal palace, was not a royal residence, and therefore not exempt from execution within it of civil process.

The judges, on the other hand, appear to have been much more tenacious of individual opinions.[3] They differed in opinion in ex-

[1] Hannen, J., in Sattomayor *v.* De Barros, 47 L. J. P. 23.

[2] See the learned opinion by Willes, J., to the contrary in Beamish *v.* Beamish, 9 H. L. 274. This is in accordance with the American doctrine.

[3] Lucas *v.* Nockells, 1 C. & F. 450, was originally tried by Tenterden, and his judgment was confirmed by the eight judges constituting the Exchequer Chamber. In the House of Lords Parke alone held out against the opinion of twelve colleagues. In Beckham *v.* Drake, 2 H. L. 578, Parke changed his mind.

actly one half of the cases in which they were consulted. In seven of these cases they were equally divided: Wright *v.* Tatham,[1] Stephenson *v.* Higginson,[2] Gosling *v.* Veley,[3] Mayor of Drogheda *v.* Holmes,[4] Hooper *v.* Lane,[5] Cox *v.* Hickman,[6] Atty.-Gen. *v.* Dakin.[7]

In the case of the Mayor of Drogheda *v.* Holmes, all the judges of England were opposed to all the Irish judges as to the validity of a lease by a municipal corporation.

Cox *v.* Hickman is a most important case on partnership. The creditors of an insolvent manufacturer agreed to carry on the business of the debtor, and to apply the net profits to the payment of the debts. The judges of the Exchequer Chamber were equally divided in opinion as to whether this constituted a partnership among the creditors. The House held that it did not, following the opinion of Channell, Wightman, and Pollock; Blackburn, Crompton, and Williams, *contra*. This case put an end to two notions, — first, that third persons may hold to the liability of partners those who in fact are not partners merely because some other relation exists between them; second, that participation in the profits of a business is a conclusive test of partnership. As Lord Cranworth said: —

"It is often said that the test, or one of the tests, whether a person not ostensibly a partner is, nevertheless, in contemplation of law, a partner, is, whether he is entitled to participate in the profits. This, no doubt, is in general, a sufficiently accurate test; for a right to participate in profits affords cogent, often conclusive, evidence that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim. But the real ground of the liability is that the trade has been carried on by persons acting in his behalf. When that is the case, he is liable to the trade obligations, and entitled to its profits, or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable to the other; namely, the fact that the trade has been carried on on his behalf; *i. e.*, that he stood in the relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred and under whose management the profits have been made."

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[1] 5 C. & F. 670.
[2] 3 H. L. 652.
[3] 4 H. L. 711.
[4] 5 H. L. 460.
[5] 6 H. L. 442.
[6] 8 H. L. 267.
[7] 4 E. & I. App. 346.

This decision does not, however, offer any alternative test of partnership; for the suggestion as to the necessity of an agency is of little assistance in a doubtful case. The agency is the result of the partnership, not *vice versa.*

Among other cases in which there was a marked difference of opinion was the famous Bridgewater will case, in which the family of Lord Brownlow was confirmed in the estate which they inherited from the Duke of Bridgewater, free from the condition that Lord Alford should obtain a step in the peerage, which was held to be void on grounds of public policy. Giles *v.* Grover,[1] a leading case on the law of executions, and one of the most elaborately discussed cases to be found in the reports, is also worthy of notice.

A point involved in much difficulty, upon which the authorities are irreconcilable, came before the House in the case of Gibson *v.* Small.[2] In a time policy of insurance effected on a vessel at sea is there an implied condition that the ship is seaworthy on the day when the policy is intended to attach? It was decided that there is no such condition; but there is much to be said on the other side of the question. It was admitted by the majority of the judges that there was an implied warranty in voyage policies; *i. e.*, that the vessel is in such a state as to be able to encounter the ordinary perils of the adventure in which the policy states it to be then engaged. Such warranties arise, first, out of the expressed state of the adventure, so that both parties are informed as to the extent and modifications of the contract. But a time policy is on the ship merely from the date stated in it for a period therein fixed. It is altogether silent as to the adventures in which the ship, during the period insured, may be engaged. How, then, is the implied warranty of seaworthiness to be known, as to its extent or modifications, from the contract itself? In a voyage policy, the date at which the implied warranty of seaworthiness is to be fulfilled is the commencement of the adventure stated in the policy. A time policy, on the other hand, is the insurance of a part of the general risk of the owner for a given period. If it is to be referred back to the time when the owner's risk commenced, the implied warranty of seaworthiness would be fulfilled if the ship was seaworthy when the owner first possessed it, for then his risk first began. But this would be absurd. The other conclusion would be to refer it to some other period without knowing where or in what

[1] 1 C. & F. 72.

[2] 4 H. L. 352.

situation the vessel was, or how engaged at the time of effecting the insurance; and, if so, to the commencement of some unknown adventure, which would have been expressed in a voyage policy. Williams and Erle dissented. Erle was of the opinion that whether the condition was derived from the construction of the words of the instrument or from implication of law founded on the nature of the contract, time policies are subject to it as well as voyage policies. He said: —

"If the question turns on the construction of the instrument, time policies may be taken to be identical with voyage policies in all the terms except those relating to the measure of the duration of the insurance. This, in voyage policies, is measured by the motion of the ship; in time policies, by the motion of the earth. Each contract is for an indemnity, and each for a limited time; and there seems no reason for holding that an alteration in the terms relating to the time should alter the effect of terms relating to the indemnity. . . . If the question turns upon an implication of law arising from the nature of the contract, all the reasons for making the implication in voyage policies are of equal force for making it in time policies. It is equally essential as the basis of the calculation on which the insurer fixes the amount of premium, and equally essential to prevent fraudulent owners from insuring a ship for the purpose of its being lost." [1]

Scott *v.* Avery [2] is another interesting case arising out of a policy of marine insurance. One of the conditions in a policy of insurance on a ship effected in a mutual insurance company was that the sum to be paid to any insurer for loss should in the first instance be ascertained by a certain committee; but if a difference should arise between the insurer and the committee "relative to the settling of any loss, or to a claim for average, or any other matter relating to the insurance," the difference was to be referred to arbitration in a way pointed out in the conditions: "provided always that no insurer who refuses to accept the amount settled by

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[1] The point was again argued in Dudgeon *v.* Pembroke, 2 A. C. 284. Parke and Campbell expressed the opinion that there was no warranty of seaworthiness in any policy. This view was afterwards adopted in Thompson *v.* Hopper, 6 El. & Bl. 172. Erle dissented, saying, "It does not appear that any person ever expressed the opinion that there was no warranty in any time policy until Baron Parke spoke in the House of Lords."

Many American authorities favor the minority view. See Hoxie *v.* Pac. M. Ins. Co, 7 Allen, 211, as a development of the middle ground taken by Chief Justice Shaw in Capen *v.* Washington Insurance Company, 12 Cush. 517.

[2] 5 H. L. 811.

the committee shall be entitled to maintain any action at law or suit in equity on his policy" until the matter has been decided by the arbitrators, "and then only for such sum as the arbitrators shall award." Furthermore the obtaining of the decision of the arbitrators was made a condition precedent to the maintenance of an action. In this case a dispute had arisen between the insurer and the committee as to the amount to be paid, and the former had refused to arbitrate. Crowder, Wightman, Cresswell, and Coleridge, constituting a majority of the judges, took the view, which was adopted by the House, that the prescribed conditions were lawful, and that (even though the difference related to other matters than mere account) till award made no action was maintainable. The losing party relied upon a decision of Lord Kenyon,[1] among others holding that if a contract simply contains a covenant to refer to arbitration, then an action may be brought although there has been no arbitration. The prevailing judges granted the principle of law, established by these cases, that parties cannot by contract oust the courts of jurisdiction. In this case, however, the arbitration was merely a condition precedent to an action. "This is not ousting the jurisdiction of the court," said Lord Campbell, "because they have no jurisdiction whatsoever, and no cause of action accrues until the arbitrators have determined;" and he illustrated the principle by reference to an action on a horse race which had just been tried in the Court of Exchequer,[2] where the winner, who had contributed to the sweepstakes, said that his horse had won, and brought an action against the stakeholder to recover the stakes. But it was a condition of the race that if any dispute arose the stewards should decide; and the stewards, it seems, had differed in opinion. The plaintiff attempted to show that his horse had won, but it was held that he could not do that — that even if the horse could clearly be shown to have won, the action had not accrued until the arbitrators, the stewards, had determined. Martin, Crompton, and Alderson took a different view of the question. Alderson said: —

"Although the contract provides that a suit may thereafter be instituted, yet the suit is to be only for such sum as the arbitrators may award, thus giving to the arbitrators the entire and exclusive determination of every possible question as to the law of insurance in case of a loss, and leaving to the courts of law alone the insignificant authority of

[1] Thompson *v.* Charnock, 8 T. R. 139.

[2] Brown *v.* Overbury, 11 Ex. 715.

enforcing, if necessary, by suit the fiat of the arbitrators. It seems to me sufficient to state this proposition in order to ascertain how it should be decided. What is it but practically and really to oust the jurisdiction of the courts if you take from them the power to determine all possible questions, and leave them only the barren privilege of being allowed to countersign the decision and enforce payment of the sum awarded by the arbitrators ? "

Since the reorganization of the English judicial system by the Judicature Act the judges appear to have been assembled only four times: Mordaunt *v.* Moncreiffe,[1] Allison *v.* Bristol Marine Ins. Co.,[2] Dalton *v.* Angus,[3] Allen *v.* Flood.[4]

The question which arose in Mordaunt *v.* Moncreiffe was whether the statutory proceeding for dissolution of a marriage can be instituted or proceeded with either on behalf of or against a husband or a wife who, prior to the institution of such proceedings, had become incurably insane. A petition of divorce against a wife had been met by an allegation of her insanity and consequent inability to defend herself. The court below appointed a guardian for her, and a verdict of insanity having been rendered, proceedings were suspended, with liberty to the husband, however, to apply to the court in the event of her recovery. The husband appealed to the House of Lords, insisting that the wife's insanity ought not to bar or impede the investigation of the charge of adultery brought against her. It was argued at the bar, in reply, that the suit was a criminal proceeding, or analogous to a criminal proceeding, and so by law could not be carried on against one who was disabled by insanity from making a defence; and that the contrary view would be so obviously unjust and unreasonable that the statute cannot have intended it. But it was held, in accordance with the opinion of a majority of the judges (Brett alone dissenting), that adultery, though a grievous sin, is not a crime, and that the analogies and precedents of criminal law have no authority in a civil tribunal like the Divorce Court. The case was therefore remanded with directions to proceed.

The last two cases, Dalton *v.* Angus and Allen *v.* Flood, involved issues of the greatest importance, and amply deserved the elaborate consideration to which they were subjected. The former case, in which the law relating to easements was exhaustively examined,

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[1] 1 Scotch & Div. App. 374.
[2] 1 App. Cas. 214.
[3] 6 App. Cas. 742.
[4] [1898] A. C. 1.

was twice argued in the presence of the judges. The point actually decided was that a right to lateral support from adjoining land may be acquired by twenty years' uninterrupted enjoyment, for a building newly built or altered so as to increase the lateral pressure at the beginning of that time; and it is so enjoyed if the enjoyment is peaceable and without deception or concealment, and so open that it must be known that some support is being enjoyed by the building. The seven judges who attended at the second argument agreed substantially on all the questions submitted to them, except that Lindley, Lopes, and Bowen constituted a minority on the question whether the trial judge should have left to the jury the issue as to whether the enjoyment was in fact open. The opinions of Bowen and Lindley are fine specimens of legal scholarship. This whole doctrine is generally repudiated in this country. Of course, the right of lateral support for land in its natural state is universally recognized.

The case of Allen *v.* Flood has already been ably discussed in the REVIEW, and it will suffice to state the issue briefly. The plaintiffs were shipwrights (and members of a trade union) employed by the Glengall Iron Company on the repair of a ship. The company had also engaged for the iron work on the ship men who were members of another trade union. A dispute having arisen between the two trades as to the claim of the shipwrights to do iron work, the iron workers, with a view to preventing what they consider unfair competition, agreed that they would not work with shipwrights who sought and obtained employment outside their own trade. This action was afterwards brought against the defendant, a representative of the iron workers, for having maliciously induced the company not to engage or employ the plaintiffs as shipwrights. At the trial Justice Kennedy, while he did not suggest to the jury that the action of the appellant apart from its motive constituted a legal wrong, directed the jury to consider whether the defendant acted "maliciously;" and he explained that by maliciously he meant "with the intention and for the purpose of doing an injury." The substance of the verdict was that the company was maliciously induced by the defendant to discharge the plaintiffs. In the Court of Appeal Esher and Lopes, JJ., followed the doctrine laid down in Temperton *v.* Russell, to which Rigby, J., also deferred as binding. The view of the Court of Appeal may be stated thus: To induce another person to commit an act which is within his legal right does not in itself afford a

cause of action, but the person who procured his action is guilty of a legal wrong if he was actuated by an intent to injure. In the House of Lords six of the eight judges who attended were of the opinion that the judgment of the Court of Appeal was right. But the House by a vote of six to three reversed the judgment, holding that an action will not lie against an individual defendant for causing the discharge of the plaintiff by the latter's employer, if the defendant has not committed, or caused to be committed, any act which would be of itself unlawful, without regard to the motive with which it may have been done. The final judgment, therefore, was in accordance with the opinion of eight judges (Watson, Herschell, Macnaghten, Shand, Davey, James, Mathew, and Wright), as opposed to thirteen (Halsbury, Ashbourne, Morris, Hawkins, Cave, North, Wills, Grantham, Lawrance, Esher, Lopes, Rigby, and Kennedy). In spite of numbers the real weight of opinion is decidedly in favor of the final decision. The two ablest judges in the Court of Appeal agreed with the four greatest lawyers in the House.

Van Vechten Veeder.